Supreme Court, U.S.
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No. __-____

IN THE
Supreme Court of the United States

ENRON POWER MARKETING, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY D. WATKISS
BRACEWELL & PATTERSON, L.L.P.
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 828-5800

LOUIS R. COHEN
Counsel of Record
JOSEPH E. KILLORY, JR.
IJAY PALANSKY
MICHAEL PLOTNICK
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Petitioner Enron Power Marketing, Inc.

30pp

QUESTIONS PRESENTED

Whether the Federal Energy Regulatory Commission (FERC) has jurisdiction under the Federal Power Act (FPA), 16 U.S.C. §§ 792 *et seq.*, to regulate all transmission of electric energy in interstate commerce, including interstate transmission of electric energy that is sold to retail customers at a "bundled" price.

Whether FERC had jurisdiction and the obligation under the FPA to eliminate pervasive "undue discrimination" in the provision of interstate electric energy transmission services by requiring transmission-owning utilities to provide interstate transmission services on the same terms to all users, for all interstate transmissions, including transmissions bundled with retail sales.

Whether the court of appeals erred in ruling that FERC had discretion to interpret the FPA as denying FERC the necessary jurisdiction to remedy the undue discrimination it had found in the provision of interstate transmission.

PARTIES TO THE PROCEEDING

The list of parties before the court of appeals is set forth at Petitioner's Appendix 683a to 688a.

RULE 29.6 STATEMENT

Enron Corp. is the only publicly held company owning 10% or more of the petitioner's stock. The following companies are the parent companies of petitioner:

Enron Corp.

Enron North America Corp.

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PETITION FOR A WRIT OF CERTIORARI

Enron Power Marketing, Inc. (Enron) respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case. A prior petition by other parties (No. 00-568) was docketed on October 13, 2000. In broad terms, the petition in No. 00-568 contends that FERC Order No. 888 and related orders exceeded FERC's jurisdiction. The present petition contends that, on the contrary, FERC understated its jurisdiction and hence failed to respond to a serious nationwide problem it had found and was obligated to cure. The present petition is timely filed under this Court's Rule 13.1 and is not a conditional cross-petition under Rule 12.5.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 225 F.3d 667 (D.C. Cir. 2000), and reprinted at Petitioner's Appendix (Pet. App.) 3a to 121a. Federal Energy Regulatory Commission Order No. 888 is reported at F.E.R.C. Stats. & Regs. ¶31,036, 61 Fed. Reg. 21,540 (1996). Its rehearing decisions, Order No. 888-A and Order No. 888-B, are reported respectively at III F.E.R.C. Stats. & Regs. ¶31,048, 62 Fed. Reg. 12,274 (1997), and 81 F.E.R.C. ¶61,248, 62 Fed. Reg. 64,688 (1997). Relevant portions of FERC Orders Nos. 888 and 888-A and FERC's Notice of Proposed Rulemaking, F.E.R.C. Stats. & Regs. ¶32,514, 60 Fed. Reg. 17,662 (1995), are reprinted at Pet. App. 125a to 654a.

JURISDICTION

The court of appeals entered its judgment on June 30, 2000, and issued its order denying a timely-filed motion for rehearing on August 22, 2000. This petition is timely filed pursuant to 28 U.S.C. § 2101(c) and S. Ct. R. 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Sections 201, 205, 206, 211, 212, 213, and 313 of the Federal Power Act (FPA), 16 U.S.C. §§ 824, 824d, 824e, 824j, 824k, 8241 and 8251, are reprinted in the Appendix at Pet. App. 652a to 681a.

Sections 1, 4, and 5 of the Natural Gas Act (NGA), 15 U.S.C. §§ 717, 717c, and 717d, are reprinted in the Appendix at Pet. App. 645a to 651a.

Relevant portions of FERC Orders Nos. 888 and 888-A are reprinted in the Appendix at Pet. App. 125a to 551a.

STATEMENT

A half century ago, electricity was provided to almost all users by regulated-monopoly local electric utilities that performed all three functions (electric energy generation, transmission, and distribution) and sold electricity to each user for a single "bundled" charge. Today, electric energy is generated and marketed by a multitude of competing firms (including the traditional utilities competing in other markets), and it is carried to customers over transmission facilities connected into the interstate grid. Important segments of the grid, however, continue to be owned by the monopoly local utilities.

The central issue in this case is the authority and obligation of FERC to prevent the utilities that own these segments of the interstate grid from discriminating in favor of their own service to their own customers and against competing suppliers of electric energy. FERC found that transmission-owning utilities have an inherent incentive to discriminate, and have discriminated, against competing suppliers that are dependent on the utilities for transmission services. Pet. App. 214a-216a, 315a-331a. To remedy this (in part), FERC required each such utility to adopt a pro forma "open access transmission tariff" (OATT) and to take transmission services for its own *wholesale* sales under the OATT pursuant to the same terms and conditions it offers to other users. Pet. App. 178a. FERC applied this same requirement to *un*bundled retail sales, i.e., retail transactions in which the utility, either on its own or at the behest of state regulators, states separate charges for the electric energy and for the service of transmitting the energy. Pet. App. 306a. But FERC declined to apply this requirement to a utility's transmission services for which the charge is "bundled" by the utility into its retail charge for electricity. FERC at first stated that it was not "necessary" (although it would be "helpful") to impose the OATT on the transmission component of bundled retail sales, Pet. App. 234a, but FERC

ultimately relied solely on an asserted lack of jurisdiction. *See* Pet. App. 454a-456a.

The court of appeals upheld FERC's exercise of jurisdiction over interstate transmission for wholesale and unbundled retail sales, and upheld FERC's discretion to determine that it lacked jurisdiction over interstate transmission for bundled retail sales. The result is an interpretation of the statute that is contrary to its plain language and to the established interpretation of the parallel provision of the Natural Gas Act, 15 U.S.C. § 717, and that leaves transmission owners free to continue the discrimination FERC found with respect to most of the electric energy they carry.

A. Petitioner

Petitioner Enron is one of North America's largest marketers of electric energy, selling to both wholesale and retail customers. To transmit the electric energy it sells, Enron buys transmission services over systems owned by other firms, including local-monopoly utilities. Enron depends on access to these systems on nondiscriminatory terms (which include both price and conditions of service) to be able to compete in the sale of electric energy. Some of Enron's sales activity is in direct competition with the sales operations of the transmission-owning utilities on whose systems Enron must depend.

B. Statutory Background

The FPA gives FERC jurisdiction over "the transmission of electric energy in interstate commerce" and "all facilities for such transmission." FPA § 201(b), 16 U.S.C. § 824(b). It also gives FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce." *Id.* These are two distinct grants of jurisdiction. Unlike its jurisdiction over the sale of electricity, FERC's jurisdiction over interstate "transmission" is not limited by the words "at wholesale." *See* Pet. App. 338a ("statute . . . makes no

distinction between wholesale transmission and retail transmission"); *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) (interpreting the parallel provisions of the NGA, 15 U.S.C. §§ 717 *et seq.*).[1]

Section 205(b) of the FPA, 16 U.S.C. § 824d(b), bars any public utility, "with respect to any transmission or sale subject to the jurisdiction of the Commission," from "grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage" and requires each utility to file tariffs setting forth its "practices." Section 206(a), 16 U.S.C. § 824e(a), commands that if FERC determines that a practice is "unjust, unreasonable, unduly discriminatory or preferential," FERC must cure the discrimination and "determine the just and reasonable . . . practice . . . to be thereafter observed and in force, and shall fix the same by order."

C. Regulatory Background

The FERC orders at issue respond to two fundamental changes in the marketing of electricity over the last several decades. First, with strong congressional encouragement, independent generators and marketers of electric power have emerged to compete with each other and with the local utilities that traditionally supplied electricity on a local-monopoly basis. Second, it has become physically possible to transmit electric power over longer distances without excessive losses, and transmission facilities have been interconnected into a large interstate grid. Hence where both the generation and delivery of electric power were once largely local, and prices for electricity were once determined

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[1] All of the provisions of Part II of the FPA pertinent to this case are "in all material respects substantially identical" to parallel provisions of the NGA. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (quotation omitted). This Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Id.*

primarily by state regulation based on each utility's costs,[2] generation and marketing are now subject to intense interstate competition.

Congress began to encourage the construction of competitive electric generation facilities in 1978 in response to the energy crisis of the 1970s. The Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601 *et seq.* (PURPA), provided an incentive for such construction by requiring traditional utilities to buy power from competitive facilities under specified conditions. *See* 16 U.S.C. §§ 2601, 2611; Pet. App. 147a-148a. This modest step launched a transformation of the industry such that "[i]n 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities." Pet. App. 151a (citation omitted).

New, competitive generation facilities, however, faced a big roadblock. "[T]hese entities needed transmission service in order to compete in electricity markets." Pet. App. 150a. In order for there to be competitive power markets, "all wholesale buyers . . . must have equal access to the transmission grid." Pet. App. 558a. Congress took aim at this roadblock by enacting the Energy Policy Act of 1992 (EPAct), 42 U.S.C. § 6807a, which gave FERC greater authority to order transmission-owning utilities to serve competing marketers. *See* Pet. App. 154a.

Three years later, in response to complaints about the halting, case-by-case implementation of third-party transmission rights under EPAct, FERC promulgated Order

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[2] Under the historical model, in which a stand-alone monopoly utility performed or contracted for generation, transmission, and delivery and billed for all of those services with a single, bundled charge, power typically was generated close to the user. This pattern of self-sufficient regional or local utilities, each located near a captive customer base, was encouraged by the then existing regulatory scheme. For a rate-of-return-regulated local monopoly, the availability of lower-cost electricity from other regions was of little or no consequence. *See* Pet. App. 141a-145a.

No. 888. Pet. App. 157a-159a; 382a ("Utility practices that were acceptable in past years, if permitted to continue, will smother the fledgling competition in electricity markets and undermine the national policies reflected in the Energy Policy Act of 1992 to encourage the development of competitive markets."). In Order No. 888, FERC found pervasive undue discrimination by owners of transmission facilities—and found that it had a duty to eliminate this discrimination. "The inherent characteristics of monopolists make it inevitable that [owners] will act in their own self-interest to the detriment of others by . . . providing inferior transmission to competitors . . . to favor their own generation, and it is our duty to eradicate unduly discriminatory practices." Pet. App. 214a. FERC also found "more than sufficient reason to believe that transmission monopolists currently engage in unduly discriminatory practices, and that they will continue to engage in unduly discriminatory practices, unless we fashion a remedy to eliminate their ability and incentive to do so." Pet. App. 216a-217a.

The remedy FERC fashioned was "functional unbundling." Specifically, FERC required every public utility to (i) purchase transmission "for all its new *wholesale sales and purchases* of energy under the same tariff of general applicability as do others" and (ii) "state separate rates for *wholesale* generation, transmission, and ancillary services." Pet. App. 178a (emphasis added).[3] FERC applied the same requirements to transmissions for unbundled retail sales, i.e., sales in which transmission and power charges are stated separately, either on the utility's own initiative or at the behest of a state regulatory commission. Pet. App. 306a.

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[3] Although FERC initially stated that its rule would apply to both wholesale purchases and wholesale sales, *id.*, it later dropped the reference to wholesale purchases, requiring a utility not to discriminate with respect to transmission only when it is *selling* power at wholesale. Pet. App. 451a-453a.

FERC declined, however, to extend its functional unbundling remedy to transmission for bundled retail sales. FERC recognized that failure to require utilities to take transmission for their retail sales under the same tariff "raises the possibility that . . . transmission service for retail purposes will be superior" to wholesale. Pet. App. 634a. But FERC said, initially, "[W]e do not believe [functional unbundling as to bundled retail sales] is necessary. In addition, it raises numerous difficult jurisdictional issues . . . ." Pet. App. 235a. On rehearing, however, FERC dropped the argument that retail unbundling was "unnecessary" and decided, instead, that the "jurisdictional issues" were an absolute bar to regulation of the interstate transmission for bundled retail sales. Pet. App. 395a; 405a-410a.

D. Proceedings Below

On petitions for review, the D.C. Circuit upheld FERC's orders against challenges both that they exceeded FERC's jurisdiction and that they did not go far enough to carry out FERC's statutory obligations to remedy undue discrimination. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681, 687 (D.C. Cir. 2000), Pet. App. 8a-9a. 20a-21a. The State of New York and other parties contended that FERC has no jurisdiction over interstate transmission for any retail sales, even unbundled sales; the D.C. Circuit rejected this contention, holding that the Act confers jurisdiction over unbundled interstate transmission of electric energy whether it is then sold at wholesale or retail. Pet. App. 34a-35a. Other parties challenged FERC's authority to remedy the undue discrimination it had found by requiring transmission-owning utilities to grant open access to the interstate transmission grid, arguing in part that the FPA did not confer such jurisdiction on FERC; the D.C. Circuit also rejected this argument, finding that FERC had "authority under FPA §§ 205 and 206 to require open access

as a generic remedy to prevent undue discrimination." Pet. App. 21a.

Conversely, Enron and other parties challenged FERC's failure to provide a complete or adequate remedy for the undue discrimination FERC had found. Enron noted that most electric energy carried over local utilities' transmission facilities is carried for bundled retail sales, and Enron argued that FERC's failure to subject such transmission to the OATT would allow local utility monopolies to continue to discriminate in favor of their own retail customers. Citing *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), Enron argued that FERC has statutory jurisdiction to regulate *all* interstate transmission of electric energy, regardless of whether that energy is then sold at wholesale or retail, unbundled or bundled. Relying on the plain language of the FPA, Enron further argued that FERC was required to remedy any undue discrimination it found in electric power transmissions over which it had jurisdiction. *See*16 U.S.C. §§ 824d, 824e. FERC acknowledged its obligation to remedy such undue discrimination, but defended its failure to do so on the basis that the FPA does not give it authority to regulate the interstate transmission component of bundled retail sales.[4]

The D.C. Circuit determined that it was appropriate to defer to FERC's statutory interpretation. The court did not

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[4] In Order No. 888, FERC determined that, although its jurisdiction over interstate transmission was unqualified, it nevertheless was "not necessary" for it to apply its nondiscrimination rules directly to transmission of electric energy for retail sales. Pet. App. 235a-236a. On rehearing, in Order No. 888-A, FERC explained that its historical practice of not regulating transmission for bundled retail sales was "not the result of a legal requirement; [but rather] the practical result of the way electricity has historically been bought and sold." Pet. App. 476a. Elsewhere in Order No. 888-A, however, FERC stated (inconsistently) that it does not have jurisdiction over transmission bundled with retail sales. Pet. App. 455a. The court of appeals upheld FERC on the ground that it had discretion to reach the latter conclusion. Pet. App. 35a.

itself reject Enron's argument that the Act gives FERC jurisdiction over transmission for bundled retail sales. On the contrary, the Court noted that a permissible reading of the statute included "constru[ing] transmissions bundled with generation and delivery services and sold to a consumer for a single charge as . . . transmission services in interstate commerce" within FERC's jurisdiction. Pet. App. 35a. The court also noted Enron's reliance on *Louisiana Power & Light* and other precedent holding that FERC's jurisdiction over interstate transmission of natural gas does not depend on whether the gas is sold at wholesale or retail, bundled or unbundled. Pet. App. 30a-35a. Without attempting to distinguish those cases, the court ruled that the decision to decline jurisdiction over interstate transmission of electric energy for bundled retail sales was "a permissible policy choice" as to which FERC was entitled deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Pet. App. 35a.

REASONS FOR GRANTING THE PETITION

Electricity is in many ways the nation's most important product. The availability and price of electricity directly affect the cost and conditions of production of almost every other product. Hence, very few legal questions are of more practical significance than the question presented by this petition: whether FERC has the authority, and whether it has the obligation, to protect competing purchasers of interstate electric transmission services against discrimination by the owners of transmission facilities in favor of their own use of the transmission grid to access their retail customers.

The D.C. Circuit erred in answering that question. The FPA, by its plain language, gives FERC jurisdiction over all interstate transmission of electric energy, regardless of the terms of sale of the energy that has been transmitted, and obliges FERC to remedy all undue discrimination in services within its jurisdiction. FERC had no discretion to interpret

away this authority and obligation. Indeed, this Court and the courts of appeals have squarely upheld the same power and obligation under the parallel provision of the Natural Gas Act in cases indistinguishable from the present case except that natural gas rather than electricity was involved. If FERC lacks jurisdiction to remedy undue discrimination in the interstate transmission of electric energy, then no agency, state or federal, has authority to do so.

I. THE D.C. CIRCUIT ERRED IN DEFERRING TO FERC'S INCORRECT INTERPRETATION OF A CENTRAL PROVISION OF THE FPA.

The FPA "'fairly bristles' with concern for undue discrimination" in the interstate transmission and sale of energy. Pet. App. 181a-182a (quoting *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987)). In particular, § 206 commands FERC to remedy "any [unduly discriminatory] rate, charge, or classification . . . [imposed by] any public utility for any transmission or sale subject to the jurisdiction of the Commission." 16 U.S.C. § 824e(a).

The remedial measures required by Order Nos. 888 and 888-A were taken pursuant to FERC's § 206 obligation to eliminate undue discrimination. FERC found "systemic anticompetitive behavior" by "monopolist" owners of transmission facilities. Pet. App. 21a; 131a-136a; 608a-621a; 16 U.S.C. § 824e. FERC explained that because of the recent increase in competition among electric power generators, the "economic self-interest of transmission monopolists" had resulted in widespread discrimination in access to and terms of interstate transmission. Pet. App. 213a-214a. FERC identified such discrimination as the single greatest impediment to competitive power markets. Pet. App. 558a. FERC concluded that in order to satisfy its mandate under § 206 it would have to "eliminate the . . . ability and incentive" of transmission monopolists to

handicap competitors by discriminating in favor of their own generation and sales. Pet. App. 216a-217a.

The remedy FERC selected to accomplish this was "functional unbundling," which required every public utility to: (i) purchase transmission under the same tariff of general applicability as other users of the same transmission services; (ii) "state separate rates for wholesale generation, transmission, and ancillary services"; and (iii) "rely on the same electronic information network [as] its transmission customers . . . to obtain information about its transmission system when buying or selling power." Pet. App. 178a.

But FERC failed to apply this remedy to the majority of interstate transmission. FERC found that it would be "helpful" in eliminating discrimination to extend functional unbundling to the transmission component of bundled retail sales. Pet. App. 235a. Indeed, FERC noted that failure to extend its rules to such transmission would allow important discrimination to continue. Pet. App. 634a. Nevertheless, FERC declined to extend its rules to transmissions for bundled retail sales, asserting that it lacked jurisdiction to do so. *See* Pet. App. 395a, 451a. As the D.C. Circuit described FERC's explanation, FERC reasoned that "once the transmission service is bundled with generation and local distribution, it becomes merely a component of the retail sale itself, over which FERC has no jurisdiction." Pet. App. 31a.

The D.C. Circuit was not itself persuaded by this explanation, but it ruled that FERC's interpretation was entitled to deference under *Chevron*. That ruling was wrong for two reasons. First, the statute itself is clear, and when Congress has spoken directly to the point at issue there is no leeway for contrary agency interpretation. *Chevron*, 467 U.S. at 842-43; *see also Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 499-503 (1998). Second, this Court has interpreted the parallel provision of the NGA in a manner that precludes FERC's interpretation of its FPA jurisdiction.

1. *The statutory language is controlling.* The FPA gives FERC explicit and unqualified jurisdiction over all interstate transmissions of electric energy, whether the electric energy is then sold at wholesale or retail, unbundled or bundled. Indeed, FERC itself and the D.C. Circuit have so recognized. Section 201(b) states, in separate phrases, that FERC has jurisdiction over (a) "the transmission of electric energy in interstate commerce," and (b) "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). As FERC has noted, its jurisdiction over interstate transmission is not limited by the words "at wholesale": "Unlike our jurisdiction over sales of electric energy, which section 201 specifically limits to sales at wholesale, the statute does not limit our transmission jurisdiction over public utilities to wholesale transmission. . . ." Pet. App. 305a, *accord* Pet. App. 338a-339a. "[S]ection 201 of the FPA, *on its face*, gives the Commission jurisdiction over transmission in interstate commerce . . . without qualification." Pet. App. 305a. The D.C. Circuit agreed that "[b]oth FPA § 201(a) and (b) clearly and unambiguously confer upon FERC jurisdiction over the 'transmission of electric energy in interstate commerce.'" Pet. App. 32a. The legislative history makes it clear that this was deliberate: "Jurisdiction is asserted . . . over all interstate transmission lines whether or not there is sale of the energy carried by those lines . . . ." S. Rep. No. 74-621, at 48 (1935) (*quoted in* Order-888, Pet. App. 343a).[5]

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[5] There is no doubt that the transmissions at issue in this case, like virtually all transmissions of electric energy today, are "in interstate commerce." As the D.C. Circuit explained, as long as such transmissions flow on interstate grids, they are in interstate commerce because, "where the transmission lines of two utilities interconnect, their energy commingles, such that inevitably some energy [is] transmitted . . . across state lines." Pet. App. 34a. *See also FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972); *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964).

Despite the clarity of the statute, the D.C. Circuit found an ambiguity which it explained as follows:

> A regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as *either* transmission services in interstate commerce *or* as an integral component of a retail sale. . . . FERC's decision to characterize bundled transmissions as part of retail sales subject to state jurisdiction therefore represents a statutorily permissible policy choice to which we must defer under *Chevron*.

Pet. App. 35a. (emphasis added). But the choice is not "either/or." The transmissions at issue are *both* interstate transmissions of electric power *and* (if the utility elects to set a single bundled charge) components of bundled retail sales. Transmission in interstate commerce does not cease to be an interstate transmission because of the manner in which the electricity is then sold. The bundling of that transmission with the sale of energy for billing purposes does not mean that an interstate transmission has not occurred. FERC's interpretation contradicts the clear language of § 201(b), and the D.C. Circuit should not have deferred to it.

2. *This Court's interpretation of the parallel provision of the NGA precludes the interpretation FERC adopted in this case. Chevron* does not command or authorize deference to an agency interpretation of a statute that is directly contrary to the interpretation of the same provision by an earlier decision of this Court. *See Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1189 (D.C. Cir. 2000) ("[c]arefully considered language of the Supreme Court . . . generally must be treated as authoritative" (internal citation omitted)). That is exactly the situation here, except that the earlier decision interpreted the parallel provision of the NGA.

In *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) (*LP&L*), this Court squarely held that NGA § 1(b) gave FERC's predecessor, the Federal Power Commission (FPC), jurisdiction over interstate transportation of natural gas for "direct" (i.e., bundled) retail sale. In relevant part, NGA § 1(b) is identical to FPA § 201(b): "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce." 15 U.S.C. § 717(b). Nevertheless, LP&L argued that the FPC lacked jurisdiction to regulate the transportation component of direct retail sales of natural gas. This Court disagreed. The Court distinguished the FPC's jurisdiction over transportation of natural gas from its jurisdiction over gas sales, explaining: "Each of these is an independent grant of jurisdiction and, though the Act's application to 'sales' is limited to sales of interstate gas for resale, the Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." 406 U.S. at 636.[6]

This Court's determination in *LP&L* that FERC has jurisdiction over the transportation component of "direct" sales of natural gas is an authoritative precedent for construing the parallel provision of the Federal Power Act; FERC had no discretion to interpret FPA § 201(b) in a contrary manner, and it was error for the D.C. Circuit to defer to discretion that FERC did not have.

Ironically, the D.C. Circuit itself explained in an earlier case why the FERC interpretation, rejected under the NGA in *LP&L* and reasserted under the FPA in the present case, is necessarily wrong. In *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992) (*MRT*), the court ruled that FERC had jurisdiction to regulate a natural gas transportation rate "imbedded in" a bundled retail sale. *MRT*,

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[6] Similarly, the Fifth Circuit held in *Fort Pierce Util. Auth. v. FPC*, 526 F.2d 993 (5th Cir. 1976) that "[t]he Commission has an independent grant of jurisdiction that applies to 'the transportation of natural gas in interstate commerce.'" *Id.* at 997 (quoting *LP&L* at 636).

969 F.2d at 1219 n.4. The court said, "FERC is not barred from regulating a pipeline's interstate transportation of natural gas merely because the sale of the gas being transported is not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute." *Id.* at 1217 (citing *FPC v. E. Ohio Gas Co.*, 338 U.S. 464, 468 (1950)). The court explained that any other rule would invite manipulation by the utility, which would be able to choose its regulator simply by offering bundled or unbundled pricing of the same product and service:

> As far as the statute is concerned, there would have been no doubt of FERC's section 1(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. To accept MRT's position would therefore be tantamount to conferring on private parties the power to decide whether FERC could set the rate for interstate transportation. Private parties would have this power because it would be entirely up to them whether to structure a direct sale and interstate-transportation transaction in terms of a bundled price or separate charges.

Id. at 1218. Similarly here, FERC's interpretation of FPA § 201(b) would make its jurisdiction over interstate transportation entirely contingent on whether the utility, which provides its retail customers with both electric energy and transmission services, selects bundled or unbundled pricing (on its own or at the behest of local regulators), an accounting matter that should be irrelevant to the FPA's grant of jurisdiction over interstate transmissions.

II. WHETHER FERC HAS JURISDICTION TO PREVENT DISCRIMINATION BY OWNERS OF INTERSTATE TRANSMISSION FACILITIES IS AN IMPORTANT QUESTION MERITING THIS COURT'S REVIEW.

The D.C. Circuit's decision that FERC lacks jurisdiction under the FPA to bar transmission owners from discriminating in favor of their own bundled retail sales presents a legal question of the greatest practical importance. The price and reliability of electricity in each locality in the Nation are obviously important to the consumers and businesses in that locality and to the economy of the Nation as a whole. To achieve low prices and high reliability, Congress has encouraged competition in the generation and interstate marketing of electric energy. Effective competition depends—as FERC repeatedly has found—on non-discriminatory access to transmission facilities, which are often owned by traditional regulated-monopoly utilities that have a strong incentive to discriminate in favor of their own services to their own retail customers. Only FERC has the authority to bar this discrimination, by requiring each transmission-owning utility to take interstate transmission service for itself on the same terms as it offers to other users of its facilities. FERC's decision to decline that jurisdiction with respect to the majority of interstate transmissions leaves exactly the kind of regulatory gap the FPA was intended to fill.

Both Congress and FERC have stressed that reliable low-cost electricity in each locality benefits not only consumers in that locality but also consumers and businesses elsewhere who use that locality's products.[7] Both Congress

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[7] *See* H.R. Rep. No. 102-474, pt. 1, at 133 (1992); Pet. App. 172a ("These potential benefits to the Nation's electricity consumers and the economy as a whole confirm the need to take generic action to remove barriers to competition."); Pet. App. 381a ("At the heart of these rules is a

and FERC also have stressed that interstate competition, enabling electricity to be produced and sold in each locality from whatever facilities can provide reliable electricity at the lowest delivered price, is now an important force in driving down prices and providing electricity as efficiently as possible. *See* H.R. Rep. No. 102-474, pt. 1, at 138 (1992) (The EPAct's "electricity provisions will promote additional competition . . . to improve the efficiency of the electric utility industry and secure the lowest possible costs for consumers."); *id.* at 133 (1992); Pet. App. 585a (lack of competition in the industry "harm[s] the economy as a whole").

It is equally clear that interstate competition to supply electric energy depends critically on nondiscriminatory access to interstate transmission. As FERC stressed, "[n]on-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and . . . lower consumer prices achievable through such competition." Pet. App. 608a. Much progress has been made in improving the efficiency of electric generation, but "the advantages of these technological advances can be achieved only if more efficient generating plants can obtain access to the regional transmission grids." Pet. App. 591a. "In the absence of non-discriminatory open access tariffs, the development of fully competitive bulk power markets cannot occur, and consumers will be deprived of the benefits that would be expected from such a competitive market." Pet. App. 610a.

In the absence of regulation to enforce nondiscriminatory access, transmission owners have a strong

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requirement that prohibits owners and operators of monopoly transmission facilities from denying transmission access, or offering only inferior access, to other power suppliers in order to favor the monopolists' own generation and increase monopoly profits—at the expense of the nation's electricity consumers and the economy as a whole.").

incentive to discriminate (and FERC found they *are* discriminating, Pet. App. 213a-215a) in favor of their own uses of the transmission system and against competitors who must cross a given utility's portion of the grid. Discrimination can take many forms, affecting access, price, and reliability. To eliminate it (in part), FERC required transmission owners to file pro forma OATTs assuring that third parties can secure access to the grid through the same procedures as transmission owners, using the same reservation and scheduling processes, subject to the same terms and conditions of service, and paying the same prices for the same services. *See* Pet. App. 160a-161a, 178a. Under Order Nos. 888 and 888-A, "comparability of access" means, for example, that all transmission users must pay transmission owners the same per-unit charge as the owners themselves pay for the same quality of transmission service, Pet. App. 133a-138a (discounts); 178a; 243a-245a (rate discounts); 252a-254a; 263a-264a (discounts); 382a-383a (discounts); that all users are subject to the same nondiscriminatory curtailment procedures in periods of system constraint, Pet. App. 276a, 458a, and that all users bear proportionate shares of the responsibility for the "ancillary service" needed to maintain the stability and reliability of interconnected transmission services. Pet. App. 249a-251a.

But FERC concluded that it could not apply the OATT to most interstate transmissions: all transmissions bundled with retail sales. If that were right, then transmission-owning utilities would be free to discriminate in favor of their own uses and against their direct competitors. They would be free, for example, to charge more than they themselves pay for comparable interstate transmission service, and to give themselves more reliable or otherwise better transmission service than they provide to their competitors, because no agency, state or federal, could block such discrimination.

State regulators might or might not have the incentive to prevent such discrimination: some might wish instead to protect the local utility and its ability to prefer its own retail customers over other in-state users and over transmission-dependent retail customers in other states. But whether or not they have the incentive, states have no general constitutional authority to regulate the terms on which "their" utilities provide interstate transmission services; no state could, as FERC partially did in Orders Nos. 888 and 888-A, require utilities to file a pro forma tariff applicable to all such interstate services. *See Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (Commerce Clause barred Rhode Island from regulating bundled wholesale of power from plant in Rhode Island to Massachusetts purchaser).[8]

This Court has made this precise point in discussing the parallel provision of the Natural Gas Act. In *LP&L*, *supra*, the Court noted that if the FPC's jurisdiction were limited to transportation of gas for wholesale sales, no agency, federal or state, could effectively prevent transportation facilities owners from discriminating in favor of their own retail customers. *See* 406 U.S. at 641. Exactly the same constitutional point applies here: if FERC does not have jurisdiction to eliminate discrimination between bundled and unbundled transmission, then no agency can protect against

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[8] Moreover, to the extent the states have any pertinent regulatory power, the regulatory regime established by the D.C. Circuit's decision will inevitably create conflicts between the states. *See LP&L*, 406 U.S. at 633. Producing states and consuming states have different incentives with respect to requiring "their" in-state utilities to provide nondiscriminatory open access to their facilities. For example, Utah might wish to keep all retail sales of power bundled, and therefore not subject to the OATT, in order to limit the amount of interstate transmission capacity that is available either to export some of the state's inexpensive coal and geothermal generation to Arizona or California or to ensure that inexpensive coal generation from Wyoming's Power River Basin can flow no further west than Utah, and not through Utah to Nevada or California.

this type of discrimination, which targets primarily competitors of the transmission owner.

The particular regulatory regime established by the decision below (bifurcating the uses of the interstate grid into "unbundled" uses subject to the OATT and "bundled" uses exempt from it), also enables transmission owning utilities to play a very unfair shell game. By initially characterizing its own power generation or power purchases as intended for bundled delivery to retail customers, a transmission owning utility can reserve and schedule use of its portion of the interstate grid at no charge, free of functional unbundling requirements. Later, before power actually flows, the utility can compare its cost to generate or purchase the power with the price at which it can resell the power "off-system" in the wholesale market. If that price is attractive, the transmission owner diverts as much of the power as it can into the competitive wholesale market. The transmission owning utility will then have obtained at no charge, and not subject to the OATT, transmission that all of its third-party competitors must pay for. Since electrons are indistinguishable, this shell game is nearly impossible to police by FERC, competitors, or state regulators.

This Court recognized long ago, in the Natural Gas Act context, that the policy of the statutes is to fill such gaps in regulatory authority. In *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1 (1961) (*Transco*), the Court held that, because Congress intended the NGA to "create a comprehensive and effective regulatory scheme," *id.* at 19 (quotation and citation omitted), where states lack power to address issues relating to the transmission or sale of energy, all doubts must be resolved in favor of federal jurisdiction, because "the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation," *id.* at 28. In *LP&L*, *supra*, the Court reiterated the point: "'[I]n a borderline case where congressional authority is not explicit, [the Court] must ask whether state authority can

practicably regulate a given area, and if . . . it cannot, then [the Court is] impelled to decide that federal authority governs.'" *LP&L*, 406 U.S. at 631 (quoting *Transco*, 365 U.S. at 19-20). The question of FERC statutory authority presented in this case is vitally important, and should be resolved in favor of such authority, for the same reasons.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY D. WATKISS
BRACEWELL & PATTERSON, L.L.P.
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 828-5800

LOUIS R. COHEN
Counsel of Record
JOSEPH E. KILLORY, JR.
IJAY PALANSKY
MICHAEL PLOTNICK
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Petitioner Enron Power Marketing, Inc.

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